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No. 80-1752

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

RAY J. WERNKE, SR., Petitioner

V.

LEE MILLER, Chief of Police of the Town of Plainfield, and personally, and JAMES MORRIS, formerly an officer of the Plainfield Town Police and personally; ROY WADDELL, an officer of the Indiana State Police and personally; CHARLES DANNER, JAMES BOONE, and MONTY McKIBBEN, the Board of Police Commissioners of the Town of Plainfield and personally; THE TOWN OF PLAINFIELD: and HENDRICKS COUNTY, INDIANA

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state may make criminal the exercise by a citizen of his right to know so as to exercise his liberty of self-government under the first and fourteenth amendments, as here, by entrapping the citizen into bribery in an attempt to punish the citizen and to frighten him in the exercise of his right of citizenship?

2. Whether a citizen has a right under the first and fourteenth amendments to know information that local officials administering the criminal law in a town are themselves criminals and oppressors, so as to be able to expose those officials and drive them from office, as against the officials' efforts to hide such information from the citizenry?

3. Whether a citizen has not a right to sue for damages under 42 U.S.C. § 1983 officials and the municipal governments they act for when he is subjected to criminal prosecution by those officials because he is seeking to

bring to public light that those officials are criminals and oppressors of the citizenry and thereby drive them from office and see them brought to justice?

4. Whether malice and bad faith in the way of an intention to punish and daunt for the exercise of first amendment liberty does not preclude probable cause to arrest and prosecute?

5. Whether the federal courts may substitute their judgment as to whether a state defendant in a criminal case may be prosecuted or ought to be prosecuted for the judgment of the duly elected county prosecutor who dismissed the criminal case against the state defendant, returned the evidence, and confessed he could not prove his case because his main witness could not be believed?

LIST OF PARTIES BELOW

In the appeal to the United States Court of Appeals from which this petition stems, the parties were: Ray J. Wernke, Sr., Plaintiff-

Appellant; Lee Miller, Chief of Police of the Town of Plainfield and personally, James Morris, formerly an officer of the Plainfield Town Police and personally, Roy Waddell and Richard Hanchar, officers of the Indiana State Police and personally, Charles Danner, James Boone, and Monty McKibben, the Board of Police Commissioners of the Town of Plainfield and personally, the Town of Plainfield, and Hendricks County, Indiana, all Defendants-Appellees.

Upon this petition, all of the above remain parties but Richard Hanchar, who is dropped as a party defendant.

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No._____

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PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner Ray J. Wernke, Sr., respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 5, 1981.

OPINION BELOW

The Order of the Court of Appeals is an unpublished order not to be cited per Circuit

Rule 35; it appears in the Appendix. The District Court's Findings of Fact and Conclusions of Law and its Summary Judgment are not reported; they appear in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 5, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution:

> Congress shall make no law . . .abridging the freedom of speech, or of the press; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the Constitution:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . .

The Civil Rights Act of 1871 (42 U.S.C. §1983):

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Ray J. Wernke, Sr., has been a home builder and realtor in and about Plainfield, Indiana, for many years. During such time he has become acquainted with many people in the vicinity of Plainfield and with the public officials of Plainfield, including members of the Police Commission and members of the Town Police.

Mr. Wernke learned from members of the Town Police, viz., from Officers Long and Pound (1) that the Chief of Police of Plainfield, Lee

Miller, had sold a gun that had come into the possession of the Police Department owing to the suicide of a friend of Mr. Wernke, Gene Coleman, on the Chief's own account, and (2) that the Chief of Police, Lee Miller, had picked the name of Mr. Wernke's son, Ray J., from a list of young people taken by the Town Police from an AWOL Marine being held by the police for prosecution as a drug dealer, all of the persons on the list supposedly having been named by the prisoner as dealing in drugs in the vicinity of Plainfield. The particular drug prosecution was eventually dismissed by the prosecutor without trial for lack of evidence. Mr. Wernke was shown the documents from the local gun dealer whereby the Chief of Police sold the dead Coleman's gun to the dealer by Officer Long. Officer Pound told Mr. Wernke that he had seen Chief Miller pick Ray J.'s name off the list of supposed drug dealers for arrest. In the case of the documents showing the sale of the gun and in the case of the list of supposed drug dealers,

the officer brought the matter to Mr. Wernke's attention without solicitation from him.

Acting upon the word he had got from those Plainfield Police Officers, Mr. Wernke tried to lay his hands on the documents and the list, his object being to bring to light the Chief's crime, and the complicity therein of Charles Danner, a member of the Town Police Commission, and to drive the Chief and Mr. Danner from office. As it turned out, Charles Danner and Chief Miller resigned their posts after having been indicted for the theft of Gene Coleman's gun and they moved to Florida

Mr. Wernke besought the advice of his friend Nip Long, who by that time had quit the Town Police, who told Mr. Wernke that he no longer had the documents showing the sale of Gene Coleman's gun or any copy of them and who told Mr. Wernke that he could probably get a copy of the documents as well as a copy of the list from which the Chief had picked Ray J.'s name from Jim Morris, a man both Nip Long and Mr. Wernke knew personally, who was in charge

of the records of the Plainfield Town Police as an officer thereof.

On the evening of October 13, 1975, Mr. Wernke called Jim Morris and asked him for a copy of the documents and the list, telling Mr. Morris that it would be worth a lot for him to have them because he could expose Chief Miller and Commissioner Danner with them, and saying to Mr. Morris that Chief Miller and Commissioner had been up to a lot of no good that he knew nothing of, with which Mr. Morris agreed. Mr. Morris agreed that Miller and Danner had got away with a lot and that it was high time someone caught up with them. Mr. Morris told Mr. Wernke his fear for his job if he were to be caught giving Wernke a copy of the documents harmful to Miller and Danner. Mr. Wernke sought to reassure Mr. Morris that Miller and Danner would not find out how he had got the papers and that he would save Mr. Morris from ruin.

Later the same night Mr. Morris spoke with the Hendricks County Prosecutor Seth B. Lewis

and the next day Prosecutor Lewis and Chief Miller met with Mr. Morris. Soon a state police detective was brought in by the Prosecutor to direct the effort to draw Mr. Wernke into bribery, namely Roy Waddell. After the first call from Mr. Wernke, Mr. Morris acted in his dealing with Mr. Wernke under the direction from Prosecutor Lewis and Officer Waddell.

In a later telephone call Mr. Morris put the matter of him getting the papers Mr. Wernke wanted in terms of how much Mr. Wernke was willing to pay for them. Eventually a course of bargaining ensued the result of which was that Mr. Wernke said he would pay $350 for the papers he wanted. Unbeknownst to Mr. Wernke, Mr. Morris could not find the papers he wanted in the police records and he never did find them. Mr. Morris endeavored to interest Mr. Wernke in other papers.

Finally Mr. Morris got Mr. Wernke to meet him in the parking lot of a bowling alley in a nearby town, and there Mr. Morris passed to

Mr. Wernke papers, none of which were of interest to Mr. Wernke who could not see the papers in the dark and Mr. Wernke gave Mr. Morris $75. Mr. Morris was bearing a hidden transmitter that was being monitored by Roy Waddell, parked nearby, but it failed. It was too dark for Roy Waddell to see what went on between Morris and Wernke. That first meeting took place November 1, 1975. Mr. Wernke became disgusted at Mr. Morris failure to come up with the documents and the uselessness of the papers Mr. Morris had passed to him. After some striving and importuning by Mr. Morris, during which Mr. Morris offered to provide Mr. Wernke a copy of a tape recording made by a police informer who was a witness in another drug prosecution of Ray J. Wernke, Mr. Wernke's son, Mr. Morris got Mr. Wernke to meet him again at the bowling alley parking lot, on November 17, 1975, when they drank some beer and Mr. Morris passed Mr. Wernke more papers, some of which were merely more legible copies of papers he had passed at the first

meeting, and what purported to be tape recordings of the informer in Mr. Wernke's son's case. Mr. Wernke gave Mr. Morris $50.

As Mr. Wernke drove away from the bowling alley, he was arrested by Roy Waddell without a warrant and charged with 2 counts of bribery. Officer Waddell had listened to the dealing between Mr. Morris and Mr. Wernke in the parking lot but had not been able to see what went on. Mr. Morris had been coached by Prosecutor Lewis and Officer Waddell on how to interest Mr. Wernke in things they knew would not serve his purpose of unmasking Chief Miller and Commissioner Danner.

Mr. Wernke was jailed overnight in the Hendricks County Jail, and the next morning he had a preliminary hearing on an affidavit of Roy Waddell, endorsed by Prosecutor Lewis, charging 2 counts of bribery, on November 1 and 17, 1975, at which the only witness was Jim Morris. Mr. Wernke was bound over to the Hendricks Circuit Court for trial by the

County Court and let to bail of $5000 on each count. The charges were dismissed over a year later, on December 16, 1976, upon the motion of Prosecutor Lewis (set forth in the Appendix), the gist of which was that Jim Morris, the State's principal witness, could not be believed.

The Plainfield Police Commission found out about Chief Miller's theft of Gene Coleman's gun not long after it took place. Its reaction was to impose a trifling penalty on Chief Miller and to set about covering the matter up and hiding it from the public, in particular from a nosy weekly newspaper in the county that had wanted to attend the Commission meeting at which the matter was taken up. The Indiana State Police investigation turned up documents that had been altered or falsified to make it look as if Gene Coleman's widow had made a gift of the gun to the Police Department, but the Commission could not get its dates straight. Commissioner Danner had a part in the Commission's effort to

cover up.

The discovery by Jim Morris that the papers Ray Wernke wanted were missing led to the aforesaid State Police investigation, using officers from outside Hendricks County, which bore fruit in the indictment of Chief Miller and Commissioner Danner for theft of Gene Coleman's gun. The charges against Miller and Danner were eventually dismissed by a new prosecutor, other than on the merits, without trial.

On January 12, 1978, Ray Wernke was subpoened to testify before the Hendricks County Grand Jury, being conducted by Prosecutor Lewis, to testify about his interest in a weekly newspaper published in Hendricks County. On January 25, 1978, Mr. Wernke had to answer such inquiries, after refusing to answer them, upon punishment for contempt by the Hendricks County Circuit Court.

Prosecutor Lewis during the efforts of Jim Morris to lure Ray Wernke into bribery believed that Mr. Wernke was giving information that

was the basis for stories being published in a weekly newspaper in the county, against which the Prosecutor had conceived an intense hatred.

Ray Wernke brought the action here to recover damages for offense against his first amendment right to find out the truth about the public officials who served him and to make known the truth about them to the public, for the purpose of casting them out of office, laying federal jurisdiction on 28 U.S.C. §1331 and 1343(3). The district court gave the defendants summary judgment because of its conviction that Mr. Wernke had committed bribery, so that there was probable cause to arrest and prosecute him for that offense, wherefore the motive of the officers and prosecutor in arresting and prosecuting Mr. Wernke became irrelevant. The district court further would not let Mr. Wernke sue the Town and the County for the alleged wrongs of their executive officials under 42 U.S.C. §1983, holding that the action of the Police Commis-

sion and of the Prosecutor were not such as to be policies of the Town and County and so be the acts of the Town and County. Nor would the district court let Mr. Wernke claim a continuing wrong to his first amendment liberty in his being haled before the county grand jury in 1978 to answer for his ownership of a county newspaper. Mr. Wernke's position was that no probable cause could have been had to arrest and prosecute him because of the bad faith purpose of the officers and the Prosecutor to punish and daunt him for daring to try and bring out the truth that the Police Chief and Commission were thieves or harborers of thieves and oppressors, and so unfit to hold the offices of public trust that they held. Mr. Wernke further contended that probable cause was negated by entrapment.

The Court of Appeals affirmed, brushing aside as ingenious but vacuous the idea that Mr. Wernke could have been hurt by the defendants out of a desire to punish and daunt him in the exercise of a first amendment right,

and agreeing with the district court that the action of the Police Commission and the County Prosecutor in a particular case could not have constituted a policy under §1983 so as to make the Town and County liable for what the commission and prosecutor had done. The Court of Appeals held that notwithstanding any entrapment, which it found excluded upon the record, probable cause was had, as entrapment was not a constitutional defense.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION REJECTS A RIGHT IN THE CITIZENRY TO KNOW THE TRUTH ABOUT ITS OFFICIALS' PUBLIC CONDUCT AND IT LEAVES THOSE OFFICIALS FREE TO MAKE THE EXERCISE OF THAT RIGHT CRIMINAL.

The First Amendment forbids the states through the due process clause of the Fourteenth Amendment to abridge "the freedom of speech, or of the press" or "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right of the people and of every person to exercise their

right under the First Amendment to know, think, believe, and express is said to be the foundation of the whole system of orderly liberty that has been handed down to us by the Founders. That right is said to be vital to the very institution of popular sovereignity, of self government. Yet there remains grave doubt that the people have any right to know the truth about the public doings of their public servants, despite Madison's warning:

" A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives." Letter from James Madison to W. T. Barry, August 4, 1882, in 9 Writings of James Madison 103 (G. Hurst ed. 1910), cited in T. Emerson, Legal Foundations of the Right to Know, 1976 Wash.U.L.Q. 1, 1.

The endemic puzzle that is raised by this case is: what is the right of the citizen under

the First Amendment when the government, here in the form of a town police commission, chooses not to let the public know information that if known by the public would convince them that some of its public officials are not fit to hold the offices of public trust and power that they hold?

Professor Meiklejohn has put the right of the people to know as an indispensable condition of their right of self-government thus:

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

A. Meiklejohn, The First Amendment Is An Absolute, 1961 Sup.Ct.Rev. 245, 257. See Ivester, The Constitutional Right To Know, 4 Hast. Const.L.Q. 109, 114-35 (1977).

The significance of the right to know to Ray Wernke's case here is that if he had such a right, the County's and the Town's clamping down on Mr. Wernke's right, their attempt to

defeat that right and to scare him away from ever trying to exercise that right again by entrapping him into the criminal act of bribery (if they even succeeded in doing that), arresting him, jailing him, letting him out on bond, and keeping the charges hanging over his head for over a year, and for over 6 months after they admit they had no possible cause to keep the charges pending (after the failure of the lie detector by Jim Morris, the state's main witness), was a violation of that right and a constitutional wrong to him by the county and town, even if the Police Commission, the county prosecutor, and the arresting state policeman cannot be charged with knowledge of such a right. Owen v. City of Independence, 100 S.Ct. 1398 (1980). If Ray Wernke had no constitutional right to know then he is only an entrapped bribe-giver with no claim on the justice of the federal courts, as the District Court and Court of Appeals found him, even if the Commission, the prosecutor, and the arresting state

policeman intended in bad faith to harm Mr. Wernke because he had set out to show the truth, that the Chief of Police and the Police Commission of the Town of Plainfield were either thieves or abettors and concealors of theft and oppressors.

If there is a right to know vouchsafed by the First Amendment, then Ray Wernke's being entrapped in bribery as punishment and scourging for daring to exercise that right against the Town of Plainfield and its police administration is an actionable wrong under the Constitution that may be redressed in damages under the Constitution itself or under §1983. Hampton v. United States, 425 U.S. 484, 490 (1976 (Rehnquist, J.).

THE COURT OF APPEALS DEPARTED FROM RULING LAW IN THIS COURT ON ANCILLARY POINTS AFFECTING PETITIONER"S RIGHT TO RECOVER FOR CONSTITUTIONAL WRONG UNDER §1983.

The effect of the Court of Appeals affirmance of the District Court's summary judgment is to take the issue of entrapment from the jury, where it has always resided under

federal law, by implication from the subjective theory of entrapment that has prevailed in the federal courts since Sorrells v. United States, 287 U.S. 435 (1932). See Note, People v. Barraza: California's Latest Attempt to Accommodate an Objective Theory of Entrapment, 68 Cal.L.Rev. 746, 749-51, 759-61 (1980). The Court of Appeals' error in this regard harks back to its root belief that Ray Wernke was not exercising any constitutional right or any other right for that matter when he was prizing loose the proof of official crime and coverup shown above. Somehow it was perverse of Mr. Wernke to call Jim Morris and ask him for the damning papers he wanted, the ones the Chief and the Commission had secreted for several years for the obvious purpose of preventing the Chief and one of the commissioners getting their just due from the citizenry, not to mention the criminal prosecution that eventually befell them. Apparently the Court of Appeals thought this so temerarious in itself as to be a badge of wrong. Surely in that

supposition it was in error. See New York Times Co. v. United States, 403 U.S. 713 (1971).

The Court of Appeals held that probable cause to arrest and prosecute Ray Wernke for bribery, even if got by entrapment, prevented Wernke recovering for damages, even if the officials who acted to cause him that injury were moved by bad faith or malice in the way of a resolve to hurt him for daring to exercise his First Amendment right to know and make known the turpitude of governing local officials, so bringing them to book before the citizenry. Again, this error of the Court of Appeals may have been owing to that court's unwillingness to own such a constitutional right. The ruling law in this Court is plain that bad faith or malicious intent to harm gives rise to an action for damages even if there is no specific intent to trespass on constitutional rights, so long as constitutional rights are violated, and that bad faith and malicious intent to hurt wipes out any

pretense of good faith or probable cause. Wood v. Strickland, 420 U.S. 308 (1975).

The Court of Appeals also went awry when it substituted its judgment for that of the county prosecutor, the same one Ray Wernke sued herein, that he had no case against Mr. Wernke because his main witness Jim Morris could not be believed. The prosecutor dumped the case, but the District Court and the Court of Appeals picked it up, the Court of Appeals on the technical ground that somehow the state could revive the case after its evidence had been returned or destroyed and after it had publicly confessed that its chief witness was not to be believed. Such a judgment entails a mighty act of imagination in the first place and it is at war with hallowed principles of federalism that prevent a federal court from second-guessing state authorities when it comes to the administration of the criminal law by the states. See Allen v. McCurry, 49 U.S.L.W. (BNA) 4015 (U.S. Dec. 9, 1980). If the county prosecutor says there is no case

(and by implication that there never was a case if he had only bothered to find out or had not been acting in bad faith), that ought to be good enough for the federal courts.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue to review the Order of the Seventh Circuit.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(Argued December 11, 1980)

January 5, 1981

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

RAY J. WERNKE, SR., Plaintiff-Appellant, VS. No. 80-1587 LEE MILLER, Chief of Police of the Town of Plainfield, and personally, et al., Defendants-Appellees	)Appeal from the)United States)Court for the)Southern District)of Indiana, In-)dianapolis Divi-)sion.)No. 77-C-586)Cale J. Holder,) Judge

O R D E R

Plaintiff Ray J. Wernke, Sr. appeals from the district court's dismissal, on defendants' motions for summary judgment, of his suit for damages under 42 U.S.C. § 1983. We affirm

As described in Wernke's deposition, Indiana State police arrested Wernke in November, 1975. Wernke was charged with bribing a Plainfield, Indiana police officer, James

Morris, in order to obtain certain police documents concerning the local police chief's sale of a gun that did not belong to him and a list of suspected drug traffickers upon which the name of Wernke's son purportedly appeared. Wernke claimed he sought the documents for his investigation as a private citizen into corrupt practices allegedly occurring in the Plainfield police department. Wernke was arrested and held overnight in jail after police observed him passing money to Morris. The bribery charges subsequently were dismissed on the state's motion when the prosecutor concluded that personal difficulties Morris developed, conbined with his refusal to complete a lie detector test, made the officer a poor witness.

Wernke brought this action naming seventeen defendants who allegedly "acted without any legal or factual basis for believing that [Wernke] had violated the law," and so, under color of state law, in "bad faith" wrongly arrested and incarcerated him. The complaint

alleges that Wernke's rights to due process were violated by an arrest that lacked probable cause, or by discriminatory selective enforcement of the law, aimed at chilling the exercise of his First Amendment rights. More specifically in regard to the existence of probable cause, Wernke claims that because he paid money to Officer Morris in order to obtain official documents that would help him ferret out police corruption, his actions were not in the nature of "bribes," and his First Amendment rights were therefore violated by the circumstances of his arrest.

The district court dismissed Wernke's claim against local government entities and certain individual defendants alleged to have acted in their official capacities, because Wernke did not claim that they acted pursuant to a policy statement, ordinance, regulation or official decision adopted or promulgated by the local bodies or officials, citing Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), and McDonald v. Illinois, 557

F.2d 596 (7th Cir. 1977).

As the suit proceeded with the remaining defendants, Wernke moved to compel enforcement of a deposition subpoena duces tecum served by him on a non-party. Wernke's motion was made six months after the deponent refused to allow inspection of the documents. The district court denied Wernke's motion, saying it was untimely under Rule 45(d)(1) of the Federal Rules of Civil Procedure.

When Wernke moved to amend his complaint to bring in certain defendants who earlier had been dismissed, the district judge denied the motion. The district court also rebuffed Wernke's attempt to add certain other defendants connected with a grand jury investigating a matter undisclosed in the record, and before which Wernke was called to testify several years after the arrest involved in this case.

After extensive discovery, all defendants filed motions for summary judgment. Wernke did not file memoranda in opposition to the summary judgment motions of some of the de-

fendants. As to those defendants to whose summary judgment motions Wernke did respond, the district court found no genuine issues of material fact remaining in the case. The district judge concluded that "the defendants did in fact have probable cause to arrest [Wernke] for the crime of bribery," and dismissed Wernke's action.

In order for summary judgment to be appropiate, there must be no genuine issues of material fact. Fed. R. Civ. P. 56; Ed Houser Enterprises, Inc. v. General Motors Corp., 595 F.2d 366 (7th Cir. 1979). In deciding whether there remains a dispute over material fact issues, the court must interpret facts in the light most favorable to the party opposing the motion for summary judgment. Technograph Printed Circuits v. Methode Elect. Inc., 356 F.2d 442 (7th Cir. 1966). Here that standard was satisfied. None of the parties dispute the events leading up to Wernke's arrest as detailed in Wernke's deposition. Wernke's own statements show that he called

Officer Morris and asked for his assistance in obtaining police documents, which Wernke knew were not generally available to the public, or even to Morris. When Morris expressed reluctance to help due to the consequences of getting caught, Wernke offered to pay for the documents, haggled over the price, and offered a job with Wernke's real estate business should Morris be dismissed from the police force for his actions. The arresting state police officers observed and overheard the exchange between Morris and Wernke of documents for money (Morris had alerted them to the transaction), and based on that surveillance concluded that there was probable cause to arrest Wernke for bribery. The district court could reasonably find on this undisputed evidence, as it did, that there was probable cause supporting the decision to arrest Wernke.

The district court's order on summary judgment did not declare (as Wernke seems to think) that Wernke was guilty of bribery, but

only that the undisputed facts supported a finding of probable cause for his arrest,1/ i.e., that the events

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1/ Wernke claims that one of the state police officers who made the arrest later told him at the time of the arrest he (the officer) did not believe Wernke was "guilty." This is the only point to which Wernke has drawn our attention in support of his assertion that the district court erroneously concluded that the underlying facts were not in dispute. The officer's statement does not sustain Wernke's assertion. The police officer's view on the question of Wernke's ultimate guilt does not dispute the existence of facts constituting probable cause to make the arrest. In fact, the officer's deposition makes clear that his comments to Wernke did not question that the events the officer had witnessed justified the arrest, and nothing in Wernke's description of the officer's later comments conflicts with that deposition testimony.

Specifically, the officer said in his deposition that he only question Morris's motives for reporting the offer of the bribe instead of ignoring it, and wondered why Wernke would make the bribe in the first place.

The state police officer's statement that the prosecutor told him to arrest Wernke likewise raises no dispute as to the existence of probable cause, it is the prosecutor's duty to see that the suspected offender is arrested.

Here, Morris had contacted the prosecutor to inform him of Wernke's offer of a bribe; the state police officer's comment that the prosecutor told the police to arrest Wernke is entirely consistent with the prosecutor's finding of probable cause and the propriety of the officer's acting upon that determination. Indeed, the supporting facts are particularly strong here, since the arresting

1/ (continued)
officers observed two transactions between Wernke and Morris, refusing to make an arrest after the first transaction because they had been unable to overhear the conversation between the two men. Simply put, there is no dispute as to the facts establishing the existence of probable cause to make the arrest, regardless of one arresting officer's doubts concerning an ultimate finding of guilt. While "appellate courts should not look the other way to ignore the existence of genuine issues of material fact," neither should they "strain to find the esistence of such genuine issues where none exist." Kirk v. Home Indemnity Company, 431 F.2d 554, 560 (7th Cir. 1970).

2/ Ind. Code § 35-1-90-4, as it read at the time of Wernke's arrest, provides in relevant part as follows:

> Whoever corruptly gives, promises or offers to any *** employee of any municipal corporation, or any political subdivision of this state, or to any officer entrusted with the administration of justice *** any money or valuable thing, or corruptly offers or promises to do any act beneficial to any such person, to influence his action *** shall, on conviction, be imprisoned in the state prison not less than two years ****.

the arresting officers witnessed were sufficient to lead a prudent person to believe Wernke was violating the law. See United States v. Sorce, 325 F.2d 84 (7th Cir. 1963), cert. denied, 376 U. S. 931 (1964). Since Wernke claims damage from an unjustified arrest, that limited finding by the district court on undisputed evidence dealt precisely with the issues Wernke raised.

Wernke's claim that he offered the bribe in the exercise of his First Amendment rights is insufficient to negate the existence of probable cause. The Indiana statute punishes those who "corruptly" offer money or promise to do acts beneficial to "any officer entrusted with the administration of justice" in order to influence the latter's conduct of public responsibilities.[2/] Wernke's offer of money and job was made to induce Morris to turn over records, which is sufficient evidence of bribery to sustain a conviction, and certainly probable cause. See Vehling v. State, 210 Ind. 17, 196 N. E. 107 (1935). The

"corrupt" intent required in the statute refers to a purpose to influence the actions of an official in discharging his duties. 11 C.J.S. Bribery, § 2 (1938). Compare Herman v. State, 247 Ind. 7, 210 N.E.2d 249, cert. denied, 384 U.S. 918 (1965) (bribe to stop police from investigating illegal gambling not an innocent, unsolicited gift). That Wernke sought to influence Morris's actions for some claimed higher purpose is irrelevant even if known by the arresting officers, since the effort to influence was itself the corrupt intent required under the statute. See 11 C.J.S. Bribery, § 2 (criminality does not depend on whether official action sought to be influenced was proper or not).

Wernke's argument that he was entrapped does not hold water. See United States v. Payne, (7th Cir. December 10, 1980) (Nos. 79-2393 and 79-2561) slip op. at 4. Entrapment is a defense to be asserted at trial, it is not determinative of the existence of probable cause for arrest. Even if entrapment could be

used to negate probable cause, "the thrust of the entrapment defense [focuses] on the intent or predisposition of the defendant to commit the crime." United States v. Russell, 411 U.S. 423, 429 (1973). The undisputed facts in this case show that it was Wernke who on his own initiative contacted Morris in order to obtain police records, who told Morris it would be "worth a lot" if he could get the records, and who then explained what "a lot" meant when the police officer expressed worries over the possible consequences. So Wernke first solicited the officer's action and then supplied the inducement for Morris to undertake the risk attending that action. Wernke simply failed to produce any evidence, even his own, to show that he was not predisposed to seek the documents in the manner in which he did--in other words, that he was entrapped.

Wernke claims that the district court was not entitled to find probable cause existed, because the state dismissed the bribery charges. The dismissal, he says, bars any court from considering whether he committed the

crime of bribery. Wernke's argument misses the point and is without merit. Absent the running of the statute of limitations, a voluntary dismissal prior to empaneling a jury does not bar subsequent prosecution on the same offense. Johnson v. State, 252 Ind. 79, 246 N.E.2d 181 (1969). The issue of probable cause, then was subject to consideration in other proceedings, especially when raised by Wernke himself.

Wernke's case also fails to the extent that his allegations of "bad faith" amount to a claim that the police engaged in a discriminatory prosecution when they arrested him for bribing Morris. In order to establish a case on such a claim, Wernke would have to show that he "had been singled out for prosecution while others similarly situated had not been prosecuted and that the Government's discriminatory selection was based upon an impermissible ground." United States v. Heilman, 614 F.2d 1133, 1138 (7th Cir. 1980). Like Wernke, the defendant in Heilman alleged that

a government prosecution was initiated to retaliate against him for the exercise of his rights to free speech. And like Wernke, the defendant in Heilman was utterly unable to show "a causal connection between the exercise of his First Amendment rights and his prosecution" for the offense, 614 F.2d at 1138, and thus was not entitled to relief. Vague testimony from one arresting officer concerning his doubt about Morris's motives for going through with Wernke's bribery scheme, see footnote 1, supra, which is the only evidence of a plot to restrict Wernke's First Amendment rights to which we are directed, scarcely is enough to create a disputed issue of discriminatory enforcement. Even if Morris was angry with Wernke for the latter's criticism of the local police department, that did not insulate Wernke from legitimate bribery charges: "Aggressively displaying one's antipathy to the . . . system or daring the government to enforce it does not create immunity from, or a defense to, prosecution."

Id. at 1139, quoting United States v. Stout, 601 F.2d 325, 328 (7th Cir. 1979).3/

Wernke's argument that the district court should have allowed him to amend his original complaint to add certain parties is without merit. We agree with the district court's determination that the proposed amendments pertaining to the Town of Plainfield and Hendricks County did not state the proper elements of a cause of action under Monell v. Dept.of Social Services of New York, 436 U.S. 658 (1978). Indeed, in his motion to amend Wernke alleged only that the town made it a "policy" to cover up the "awful truth" 4/ of the subject matter contained in the documents he attempted to gain through bribery.

3/ Wernke cites only Berke v. First Nat'l. Bank and Trust Co. of Alton, 570 F.2d 187 (7th Cir. 1978) for the contention that probable cause is not a defense to a claim of "bad faith" and malice in criminal prosecutions. The case is inapposite, as it dealt with Illinois statutes circumscribing official immunity, and did not involve a criminal prosecution. We have been unable to find other cases that establish a claim cognizable under 42 U.S.C. § 1983 for general "bad faith" in an otherwise legitimate prosecution, nor does

We think it clear that when the Monell opinion said there must be a "policy statement" or other such official statement by a municipal body in order to subject that body to liability under 42 U.S.C. § 1983, the opinion meant what it said. A single decision affecting one individual on one topic, even if alleged to have been made in some vague, cabalistic manner is not the sort of "policy statement" contemplated by Monell, nor does it even fall within the broader concept of "custom" delineated in the opinion. 436 U.S. at 690-91.

3/continued
Wernke in any way suggest what the elements of such a claim might be. While "life in all its fullness," Welch v. Helvering, 290 U.S. 111 (1933) (Cardozo, J.), might establish the elements, Wernke makes no attempt to do so, and we decline to proceed that way on our own.

4/ The "awful truth" was that the local police chief had allegedly sold for his own profit a gun that did not belong to him and which he had obtained in the course of an official investigation.

The district court acted within its discretion when it denied Wernke's motion to add as defendants the Hendricks County prosecutor, a County grand jury, and the County itself. Wernke sought to add those parties because he was later called to testify before a grand jury regarding his ownership of a newspaper. There was no allegation that the testimony related to his prior arrest for bribery, which was the subject matter of his initial complaint. Wernke was not entitled to add as defendants those who were involved in his grand jury testimony, which apparently dealt with a subject other than his earlier arrest.

Wernke claims that the district court erred in refusing to enforce, as untimely, a subpoena duces tecum on a non-party deponent. We agree with Wernke that Rule 45(d)(1) of the Federal Rules of Civil Procedure does not support the district judge's finding of untimeliness. Objections to subpoenas duces tecum under Rule 45 must be in writing, and since no written objection was made here there is no

basis for applying the time limitation contained in the Rule, which requires an order for production to be sought before or during the deposition. Any error in the district court's conclusion was harmless, however, since "there is nothing to prevent a party answering an objection that a motion to produce is untimely under Rule 45(d)(1) by renoticing a deposition or by simply issuing a new subpoena for documents under Rule 45(b)." In re Wheat Farmers Antitrust Class Action, 440 F. Supp. 1022, 1025 n.1 (D.D.C. 1977). Wernke should have made another request for the documents if, as he contends, they were important to his case.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RAY J. WERNKE, SR.,)
Plaintiff)
)
vs.) No. IP 77-586-C
)
LEE MILLER, et al.,)
Defendants)

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter comes before the Court upon the motions of defendants Lee Miller, individually and in his former official capacity as police officer of the Town of Plainfield Police Department; Charles Danner, James Boone and Monty McKibben, individually and in their official capacities as members of the Board of Police Commissioner of the Town of Plainfield; J.A. Vanderfliet, Theodore Pollion, Herod Toon, Dayle Cain and Robert Dowden, individually and in their official capacities as members of the Town Board of the Town of Plainfield; Russell Carmichael, individually and in his official capacity as Sheriff of Hen-

dricks County, Indiana; Roy Waddell, and Richard Hanchar, for summary judgment. The Court, being duly advised in the premises, now submits its findings of fact and conclusions of law.

On July 6, 1978, the Court granted certain of the defendants motions to dismiss for failure to state a cause of action upon which relief could be granted. In such entry the Court dismissed the plaintiff's action against all the individual defendants in their official capacities, and dismissed the plaintiff's action against the Town of Plainfield, Indiana and Hendricks County, Indiana. On October 22, 1979, the Court granted the motion of defendant Russell Carmichael for summary judgment and entered judgment in favor of said defendant that same date.

Accordingly, the instant motions of such defendants for summary judgment are now MOOT.

FINDINGS OF FACT

Plaintiff, Ray J. Wernke, Sr. was arrested on November 17, 1975 by certain of the defend-

ants, and he was held to answer the criminal charge of Bribery. On September 30, 1977, the plaintiff filed this action under 42 U.S.C. §1983, alleging that he was entrapped and arrested without probable cause, in violation of his civil rights. The amount in controversy, exclusive of costs and interest, exceeds ten thousand dollars.

The plaintiff's own testimony, as recorded during his deposition taken in this cause on May 21, 1979, shows that the plaintiff did in fact pay money to defendant James Morris on two occasions in order to obtain certain official records of the Town of Plainfield, Indiana, Police Department. The plaintiff's deposition, starting at page 135, reads in part as follows:

851 Q So you paid him a total of $125 for the material that he gave you in the parking lot on two occasions?

A Yes.

852 Q At that time, you knew he was an employee of the Plainfield Police Department?

A Yes, that's right.

853 Q You knew that these records came from the Plainfield Police Department?

A This is what he told me. That's where he said he had to get them, yes.

854 Q So it's your understanding that's where they came from?

A Yes.

855 Q And you knew at that time one of his functions with the Plainfield Police Department was the custodian of records?

A Yes. Nip Long told me he was in the records department."

It appears in the plaintiff's deposition that he and James Morris had various telephone conversations during which the prospect of Morris providing plaintiff Wernke with police records was discussed. It is clear that plaintiff Wernke first approached Morris with a request for the records. It appears from plaintiff's deposition that Morris expressed concern for the possibility that he might be discharged from employment if he gave plaintiff Wernke what he wanted. Wernke offered

Morris a job if Miller was fired (Plaintiff's deposition, page 97). In a later conversation, Morris asked for "six or seven hundred dollars for this information' (Plaintiff's deposition, page 93), but plaintiff Wernke counter-offered three hundred fifty dollars.

CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter of this action and of the parties thereto.

Ind. Code § 35-1-90-4 (repealed effective July 1, 1977) provides in relevant part as follows:

> " Whoever corruptly gives, promises or offers to any * * * employee of any municipal corporation, or any political subdivision of this state, or to any officer entrusted with the administration of justice * * * any money or valuable thing, or corruptly offers or promises to do any act beneficial to any such person, to influence his action * * * shall, on conviction, be imprisoned in the state prison not less than two years * * * *".

There is no genuine issue as to any material fact, and it appears from the plaintiff's own admissions that the defendants did in

fact have probable cause to arrest the plaintiff for the crime of bribery. It is clear from the plaintiff's deposition that the plaintiff made an unsolicited offer of employment to defendant Morris if Morris was discharged for delivering the information which the plaintiff requested. There is no genuine issue that the plaintiff was not entrapped.

Accordingly, the defendants' motions are now GRANTED.

Any finding of fact herein denominated as a conclusion of law or any conclusion of law herein denominated as a finding of fact shall be redenominated if such is necessary to sustain a judgment entered hereon.

Dated: March 18, 1980

/s/ Cale J. Holder
Cale J. Holder, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RAY J. WERNKE, SR.)
Plaintiff)
)
vs.) NO. IP 77-586-C
)
LEE MILLER, et al.,)
Defendants)

SUMMARY JUDGMENT

The Court this date having entered its findings of fact and conclusions of law and having granted the motions of defendants Miller, Morris, Danner, Boone, McKibben, Vanderfliet, Pollion, Toon, Cain, Dowden, Waddell and Hanchar for summary judgment, it is now

ADJUDGED, that the plaintiff, Ray J. Wernke, Sr., take nothing from the above-named defendants by way of his complaint, that this action is now DISMISSED with prejudice, and that the defendants are entitled to recover the costs of this action from the plaintiff in an amount yet to be determined.

Dated: March 18, 1980

/s/ Cale J. Holder
Cale J. Holder, Judge
United States District
Court
Southern District of
Indiana

STATE OF INDIANA) IN THE HENDRICKS COUNTY
) SUPERIOR COURT
COUNTY OF HENDRICKS) 1976 TERM

CAUSE NO. SCR76-93

STATE OF INDIANA)
)
vs.)
)
RAYMOND E. WERNKE, SR.,)

STATE'S MOTION TO DISMISS

Comes now the State of Indiana and moves the Court to dismiss the cause and as grounds shows the Court as follows:

1. That the principal witness for the State of Indiana herein is one James L. Morris, formerly employed by the Plainfield Police Department as the Records Sergeant for said department.

2. Heretofore, after confering with the investigating officials of the Indiana State Police who were involved in the foregoing cause and causes related thereto, the undersigned counsel determined that prior to trial the said James L. Morris should undergo a polygraph examination to verify the credibility of his proposed testimony.

3. The said James L. Morris has been given a polygraph examination by Leonard Harrelson, a certified polygraph examiner and director of the Keeler Polygraph Institute, Inc. of Chicago, Illinois and said Mr. Harrelson, upon completion of said examination has certified to undersigned counsel that Mr. Morris had not completed the polygraph examinations given and his story, therefore, could not be confirmed as true.

4. By reason of these circumstances counsel for the State of Indiana is not willing to proceed with the trial of this cause and subject this defendant to possible criminal penalties involving imprisonment and has heretofore so informed counsel for the defendant.

WHEREFORE, the State of Indiana prays that this Motion to Dismiss be sustained and for all other proper relief.

STATE OF INDIANA
SETH B. LEWIS
PROSECUTING ATTORNEY
55th JUDICIAL CIRCUIT

By: /s/ Seth B. Lewis

Seth B. Lewis

Seth B. Lewis
Prosecuting Attorney
P.O. Box 59
Danville, Indiana 46122
Phone: 745-5431

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing State's Motion to Dismiss has been mailed to counsel for defendant John T. Manning this 7th day of December, 1976.

/s/ Seth B. Lewis
Seth B. Lewis